

BEFORE THE  
**Federal Communications Commission**  
 WASHINGTON, DC 20554

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 MAY 13 1998  
 FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the Matter of )  
 )  
 Implementation of the )  
 Telecommunications Act of 1996: ) CC Docket No. 96-115  
 )  
 Telecommunications Carriers' Use )  
 of Customer Proprietary Network )  
 Information and Other Customer Information )

**REPLY COMMENTS OF AIRTOUCH COMMUNICATIONS**

AirTouch Communications, Inc. ("AirTouch") hereby submits its reply comments in the above-captioned proceeding.<sup>1</sup>

The numerous filings by CMRS carriers in this proceeding provide significant support for the petition of the Cellular Telecommunications Industry Association ("CTIA") seeking temporary deferral of the effective date of the application of Rules 64.2005(b)(1) and (b)(3) to CMRS providers.<sup>2</sup> These comments show that application of these new customer proprietary network information ("CPNI") rules to CMRS providers will impede competition in the CMRS market and interfere with the ability of customers to obtain new advanced wireless services and features. Further, postponing the effective date of the rules will serve the public interest by maintaining the *status quo ante* while the Commission examines the unintended and

<sup>1</sup> See "Pleading Cycle Established for Comments on Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information Request for Deferral and Clarification," *Public Notice*, DA 98-636 (May 1, 1998).

<sup>2</sup> See, e.g., Comments of ALLTEL Communications, Inc.; Comments of Bell Atlantic Mobile, Inc.; Comments of 360 Communications Company; Comments of Omnipoint Communications, Inc.; Comments of PrimeCo Personal Communications, L.P.; Comments of Sprint Spectrum L.P. d/b/a Sprint PCS; Comments of Vanguard Cellular Systems, Inc.

negative consequences of the rules as applied to CMRS providers. Finally, these commenters also demonstrate that deferral of the effective date of these new rules is well within the Commission's discretionary authority under Section 1.108 of the Commission's Rules.<sup>3</sup>

Comments filed by certain incumbent wireline entities urge the Commission to defer, stay or forbear application of Rules 64.2005(b)(1) and (b)(3) to *all* telecommunications carriers — not just to CMRS carriers.<sup>4</sup> AirTouch submits that the Commission has the authority to grant a service-specific rule deferral, and it should do so here.

Section 222 allows different treatment of services and there are significant technological and market driven differences between the services which the FCC should consider in ruling on the CTIA filing. CMRS handsets are in fact technologically inseparable from transmission service and must be programmed with data unique to each subscriber prior to service activation.<sup>5</sup> Moreover, the CMRS market is driven by vigorous competition between numerous service providers.<sup>6</sup>

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<sup>3</sup> 47 C.F.R. § 1.108. In this regard, AirTouch reiterates that the issue now pending before the Commission is the narrow, procedural question of whether the Commission should defer the effective date of Rules 64.2005(b)(1) and (b)(3). The broader questions regarding the merits of these rules can and should be resolved when the Commission addresses the expected petitions for reconsideration and/or forbearance.

<sup>4</sup> *See, e.g.*, Comments of Ameritech; Comments of Bell Atlantic; BellSouth Comments; Comments of the National Telephone Cooperative Association; Comments of SBC Communications, Inc.; Comments of U S WEST Communications, Inc.

<sup>5</sup> Indeed, as CTIA points out, CMRS handsets are so integral to CMRS service that they are part of the equipment authorized under CMRS licenses issued pursuant to Title III of the Communications Act. *See* CTIA Petition at 31-33.

<sup>6</sup> The Commission notes in the *CPNI Order* that “carrier policies concerning the protection of personal information may very well factor into the customer’s selection of their carrier.” *CPNI Order* at 50 n.233.

As noted above and as detailed in the CTIA Petition and other CMRS filings, the new CPNI rules raise issues unique to CMRS. The technology and marketing of CMRS bundled with CPE and/or information services has been different from wireline technology and marketing from the outset. In fact, the Commission recognized the unique character of CMRS and the CMRS market when it adopted the “total service approach” under Section 222(c)(1)(A).<sup>7</sup> As AirTouch demonstrated in its comments, the unique character of the CMRS market makes grant of the requested deferral critical to the CMRS industry.<sup>8</sup>

Further, as mentioned above, nothing in the statute requires identical regulatory treatment for all carriers. In addressing new Section 222, the Commission concluded that it should fashion a regulatory regime for CPNI “that balances consumer privacy and competitive concerns.”<sup>9</sup> Thus, while the Commission may acknowledge services differences and conclude that for competitive reasons it must restrict the use of CPNI by certain carriers, there is no justification for the Commission to extend such restrictions to competitive CMRS carriers.

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<sup>7</sup> CPNI Order ¶ 40.

<sup>8</sup> AirTouch Comments at 4-6, 8. Simply put, CMRS providers serve a unique market — mobility — and they have developed service packages and marketing procedures to meet this market demand. One of the most important developments in the CMRS industry has been the widespread use of product/service integration — bundling different features in packages which meet customers’ particular mobility needs. These packages often include information services such as voice mail and traffic reports, and virtually always include CMRS handsets, which act as radio transmitters necessary for service. Application of Rules 64.2005(b)(1) and (b)(3) threatens to dismantle these long-standing, pro-competitive marketing programs.

<sup>9</sup> *Implementation of the Telecommunications Act of 1996; Telecommunications Carrier’s Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking*, 11 FCC Rcd 12513, 12514 and 12521, ¶¶ 2, 15 (1996) (“NPRM”); see also H.R. Conf. Rep. 458, 104th Cong., 2d Sess. 205 (1996).

More specifically, the Commission has long held that the use of CPNI in the provision of enhanced services and CPE by monopoly carriers raises different competitive concerns.<sup>10</sup> Because of their traditional monopoly franchise, LECs have unique access to extraordinarily important and competitively valuable CPNI. For example, several types of CPNI that are solely within the LECs' possession include local calling patterns (including whether a customer makes a lot of long distance calls, places many calls to CMRS phones, or places many calls to a particular geographic area), and the use of local calling cards. In essence, LECs have very competitively sensitive information regarding virtually everyone within their service area that is relevant to the three categories of telecommunications services set forth by the Commission. Such long time local calling profiles are valuable in selectively targeting high value potential CMRS or long distance customers. Thus, customer privacy interests and competitive considerations make the CPNI restrictions different with respect to incumbent monopoly carriers.

By contrast, CMRS carriers operate in a fundamentally different market. The CMRS industry is a competitive industry in which the rigors of the market-place eliminate opportunities and incentives for CMRS carriers to act in an anticompetitive or discriminatory manner with regard to the use of CPNI. Put simply, a CMRS customer has a *voluntary* business relationship with a given carrier and can easily choose to give its business to another carrier if a given provider does a poor job of maintaining customer confidentiality. A customer's freedom and willingness to change carriers gives CMRS carriers strong incentives to use CPNI in a responsible manner, especially in light of the difficulty and expense of attracting and maintaining

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<sup>10</sup> See *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7611 (1991). See also *CPNI Order* at ¶ 7.

customers. Because of these differences, the Commission imposed no CPNI restrictions on CMRS carriers prior to the 1996 Act; further, AirTouch submits that such rule restrictions are not required as a result of the Act. Customers freely change wireless carriers and there is no indication that privacy concerns have been implicated by current practices.

In addition, the Commission has long recognized the consumer protections that are inherent in competitive markets. More than ten years ago, the Commission elected to permit BOC-affiliated cellular carriers to market enhanced services and CPE to their customers.<sup>11</sup> As the Commission recognized then, “the competitive structure of the cellular radio-telephone industry adequately protects the public from the dangers of potential anticompetitive abuse arising from the joint provision of cellular services and CPE by the [BOCs’] cellular subsidiaries.”<sup>12</sup>

Competition has increased in the CMRS market since the 1996 Act. In many markets, there are now 5 or more wireless carriers providing mobile telephony service. Thus, CMRS carriers are more strongly constrained by competitive market forces than ever before. To confirm, there is nothing in Section 222 that requires all carriers to be treated the same for purposes of the CPNI regulations.

Consequently, and for the reasons set forth in its comments in this proceeding, AirTouch respectfully requests that the Commission defer, pending a reconsideration and/or forbearance proceeding, the effective date of rules 64.2005(b)(1) and (b)(3) to the extent they

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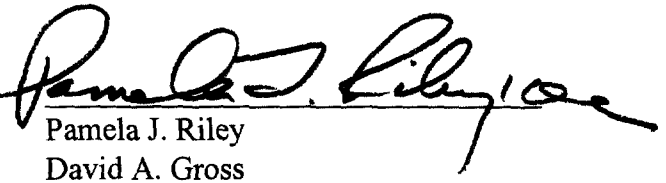
<sup>11</sup> *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 57 Rad. Reg.2d 989 (1985).

<sup>12</sup> *Id.* at 1002.

apply to CMRS providers. AirTouch further asks that the Commission act on this request before May 26, 1998, the date these two rules are currently scheduled to take effect.

Respectfully submitted,

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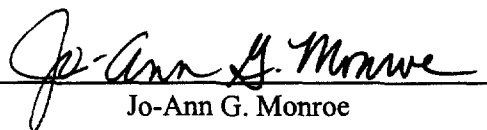
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